

Appeal from decision of the Oregon State Director, Bureau of Land Management, denying protest against dependent resurvey.

Appeal dismissed.

1. Attorneys -- Practice Before the Department: Persons Qualified to Practice

Qualifications to practice before the Department of the Interior are prescribed by regulations. Where an appeal is brought by an individual who does not appear to fall within any of the categories of persons authorized to practice, the appeal is subject to dismissal.

2. Surveys of Public Lands: Dependent Resurveys

An appellant challenging a Government resurvey has the burden of establishing by clear and convincing evidence that the resurvey is not an accurate retracement and reestablishment of the lines of the original survey.

APPEARANCES: Robert N. Caldwell for Jerald N. Hepworth.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

Robert N. Caldwell has filed an appeal from the January 24, 1983, decision of the Oregon State Director, Bureau of Land Management (BLM), dismissing a protest against the retracement, dependent resurvey, and subdivision of fractional sec. 19, T. 41 S., R. 43 E., Willamette meridian, Oregon. This resurvey (the Brooks-Bedell resurvey) was executed from 1974 to 1978 and accepted by the Oregon State Director on October 10, 1979. Appellant objects particularly to the placement of the southeast corner of lot 2, a closing corner on the Oregon-Nevada border.

The record indicates that Jerald N. Hepworth is a property owner who, in 1979, began to prepare a foundation for the placement of a double wide mobile home when he was informed by BLM personnel that approximately one-third of the home was likely to be in trespass according to the Brooks-Bedell resurvey. Caldwell, a surveyor, presented evidence for a more favorable placement of the east boundary and southeast corner of lot 2 after Mr. Hepworth protested to BLM. After protracted negotiations, BLM rejected their evidence and Caldwell brought this appeal.

[1] At the outset we must point out that Mr. Caldwell brought this appeal on behalf of Mr. Jerald N. Hepworth. Both persons presented arguments to BLM in connection with this protest, Mr. Hepworth as an affected property owner and Mr. Caldwell, a registered surveyor, as Mr. Hepworth's representative. However, Mr. Caldwell's appearance as Mr. Hepworth's representative before this Board violates the regulation governing practice before the Department, codified under 43 CFR Part 1.

43 CFR 1.3(b) lists those who are qualified to practice before the Department.

(b) Unless disqualified under the provisions of § 1.4 or by disciplinary action taken pursuant to § 1.6:

(1) Any individual who has been formally admitted to practice before the Department under any prior regulations and who is in good standing on December 31, 1963, shall be permitted to practice before the Department.

(2) Attorneys at law who are admitted to practice before the courts of any State, the District of Columbia, the Commonwealth of Puerto Rico, American Samoa, the Trust Territory of the Pacific Islands, or the District Court of the Virgin Islands will be permitted to practice without filing an application for such privilege.

(3) An individual who is not otherwise entitled to practice before the Department may practice in connection with a particular matter on his own behalf or on behalf of (i) a member of his family; (ii) a partnership of which he is a member; (iii) a corporation, business trust, or an association, if such individual is an officer or full-time employee; (iv) a receivership, decedent's estate, or a trust or estate of which he is the receiver, administrator, or other similar fiduciary; (v) the lessee of a mineral lease that is subject to an operating agreement or sublease which has been approved by the Department and which grants to such individual a power of attorney; (vi) a Federal, State, county, district, territorial, or local government or agency thereof, or a government corporation, or a district or advisory board established pursuant to statute; or (vii) an association or class of individuals who have no specific interest that will be directly affected by the disposition of the particular matter.

Appellant has not demonstrated that he fits into any of the categories listed. He is not an attorney, nor does he appear to fit any of the special categories outlined in 43 CFR 1.3(b)(3). Moreover, 43 CFR 4.3 and 43 CFR 1812.1-1 require that representatives of parties in proceedings before the appeal boards of the Office of Hearings and Appeals must be qualified under 43 CFR Part 1. These regulations were promulgated pursuant to statute, 43 U.S.C. § 1464 (1976). Their purpose is not to penalize appellants but to protect the public against the risk of inadequate representation. John H. Triggs, 74 IBLA 52 (1983).

The situation is not altered by any authorization by the property owner. This Board has held repeatedly that an appeal filed for an appellant by an attorney-in-fact who is not qualified to practice before the Department under 43 CFR 1.3 is subject to summary dismissal. Haruyuki Yamane, 19 IBLA 320 (1975), aff'd sub nom. Burglin v. Secretary of the Interior, No. 77-1655 (9th Cir. Aug. 18, 1978). The appeal will be dismissed.

If this Board were to rule on the merits of this matter, however, the appeal would fail.

In his appeal to this Board, Caldwell contended that the dependent resurvey of T. 41 S., R. 43 E., Willamette meridian, did not comport with a 1941 Oregon Highway Department map, with fence lines or with long-accepted property lines established in deeds. He particularly objects to the BLM conclusion that the fence along the east line of sec. 19 was stubbed south from the corner of secs. 17, 18, 19, and 20 rather than monumented on the Oregon-Nevada border. He also asserts that BLM did not research Nevada Highway Department records or the records of Humboldt County, Nevada.

BLM responded to appellant's substantive arguments in a letter dated April 11, 1983, as follows:

3) The state highway map does not describe found evidence at the corners in question. This is plain and evident. What accents the lack of identification of any found object is the direct tie to the well known 1/4 section corner on the east boundary of section 18. From station 51+54.6 on the center line of the highway, a tie of S. 48 degrees 24' E., 1729 feet, is given to the 1/4 section corner with the note "Rock 6" x 8" x 8", alongside. This corner was remonumented in the BLM resurvey and referred to in the Affidavit by Raymond G. Lasa.

Mr. Lasa says that around the year 1941, he worked on a survey that began at the east quarter corner of section 18 where they found the original scribed rock. They surveyed south one-half mile to the corner of sections 17, 18, 19, and 20, where he states "we did not find any evidence of the original government corner at that time, there was no witness rock or anything."

The date Mr. Lasa observed the conditions on the ground was approximately the same period in history that the highway survey was conducted. Mr. Lasa could see nothing and the map does not indicate anything at the corner of sections 17, 18, 19, and 20. The map does not indicate anything physical at the corner of sections 19 and 20 on the state line. It shows a point that can be arrived at mathematically by protraction south from the East 1/4 corner of section 18 or by running a compass line south from the same point. This, together with the known practice of highway surveys at that time, the limited need they had for accurate property lines and the demonstrated errors in the original subdivisional surveys, eliminates the map as best evidence for corner reestablishment.

There is no disregarded coincidence of the measurement of 1907 feet from the highway center line, east along the state line to the fence corner. This is the distance that is obtained, give or take a few feet, whether you calculate the position south of the East 1/4 corner of section 18, through the highway tie, or whether you run a compass line south from the same 1/4 corner or whether you build a fence due south using similar control. The fact is that this condition does not identify or reestablish the lost section corner on the state line.

The 1954 fence building contract makes reference to only one found corner on the state line at least a mile and one half east of the highway and common report informs us that the fence was simply stubbed south the short distance to the state line.

4) The southwest corner of Lot 2 was not disregarded in the dependent resurvey. The position reported is that identified by the local monuments identifying the intersection of the Hay Reservation boundary with the state line. The actual point is covered by buildings. The monuments of the one professional land survey in the area are relied on to compute the point of intersection. This point is not control for the land line system established by James P. Currin in 1881 and is only an item of information in the Bureau's dependent resurvey. It does not mark a corner of Federal land. However, the boundary as marked in the 1973 local survey by J. R. Caldwell, L.S. No. 768, is harmonious with found original corners and the land line system in the township.

The survey records on the Nevada side of the state line were researched as part of the dependent resurvey project. The surveys in Nevada close against the state line and do not control the land line system in Oregon. This is also true of the point where the Hay Reserve boundary crosses the state line. The intersection point is a closing corner and does not control the reestablishment of the section corners under discussion on the Oregon side of the state line. In fact this point was not even called for in 1881 when James P. Currin retraced the state line for the south boundary of the township.

5) The interests of all the residents in the area affected by the resurvey is of paramount concern to this Bureau. For this reason, the investigation looked closely at the lines of occupancy and the deeds that use corners of the rectangular system. The evidence developed showed that no one had invested in a proper survey to identify their property lines, were using points stubbed from one direction only, and where two adjacent deeds began at the same corner of the sectionalized system, the lines of possession showed location by measurement brought in from different directions causing widely spaced beginning points that should be one and the same.

There has been nothing offered to show that moving the lines necessary to accommodate Mr. Caldwell's client would do anything but compound the problems of other landowners in the area.

[2] An appellant challenging a Government resurvey has the burden of establishing by clear and convincing evidence that the resurvey is not an accurate retracement and reestablishment of the lines of the original survey. Bethel C. Vernon, 37 IBLA 226 (1978); Henry O. Woodruff, 24 IBLA 190 (1976). Where, as here, a protestant does not meet this burden, a decision dismissing the protest against the survey must be affirmed. Bethel C. Vernon, 47 IBLA 315 (1980).

A review of the record and the information appellant submitted does not offer clear and convincing evidence that would compel a conclusion that the resurvey was erroneous. BLM correctly dismissed this protest.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeal is dismissed.

Will A. Irwin
Administrative Judge

We concur:

C. Randall Grant, Jr.
Administrative Judge

Franklin D. Arness
Administrative Judge
Alternate Member

